(1) Supreme Court, U.S.
FILED

041328 APR 1 - 2005

OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

BRIAN BUSH FERGUSON,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

Eric H. Holder, Jr.
Counsel of Record
Robert A. Long
Elaine W. Stone
Sarah L. Wilson
James M. Garland
Jenny C. Ellickson
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioner

QUESTION PRESENTED

Whether the Supreme Court of Appeals of West Virginia erred when it held, in accord with the Eighth Circuit and the highest courts of two States, but in conflict with the First, Fifth, Sixth, and Ninth Circuits and the highest courts of four States, that "testimonial hearsay," which is barred from criminal trials under *Crawford v. Washington*, 124 S. Ct. 1354, 541 U.S. 36 (2004), unless the defendant had a prior opportunity for cross-examination, is restricted to statements made to government officials and does not include statements that an objective witness would conclude were intended for use at a later trial.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 8

I. The Decision Of The Supreme Court Of Appeals Of West Virginia Conflicts With Decisions Of Four Federal Courts Of Appeals, As Well As The Highest Courts Of At Least Four States. 8

II. The Conflict Is Mature And Requires Immediate Resolution By This Court. 9

III. Deciding The Question Presented Is Necessary To Complete This Court's New Framework For Analyzing Confrontation Clause Violations. 11

IV. This Case Provides An Ideal Vehicle For Resolving This Important Question. 12

CONCLUSION 13

APPENDIX 1a

TABLE OF AUTHORITIES

FEDERAL CASES

Page(s)

Crawford v. Washington, 124 S.Ct. 1354, 541 U.S. 36 (2004) ..... *passim*

Evans v. Luebbers, 371 F.3d 438 (8th Cir. 2004) 10

Guidry v. Dretke, 397 F.3d 306 (5th Cir. 2005) 8

Horton v. Allen, 370 F.3d 75 (1st Cir. 2004) 9

Ohio v. Roberts, 448 U.S. 56 (1980) 3, 11

Parle v. Runnels, 387 F.3d 1030 (9th Cir. 2004) 9

United States v. Cromer, 389 F.3d 662 (6th Cir. 2004) 8, 9

United States v. Saget, 377 F.3d 223 (2d Cir. 2004) 11

STATE CASES

City of Las Vegas v. Walsh, 91 P.3d 591 (Nev. 2004) 9

Stancil v. United States, 866 A.2d 799 (D.C. 2005) 4, 11

State v. Barnes, 854 A.2d 208 (Me. 2004) 10

State v. Dedman, 102 P.3d 628 (N.M. 2004) 10

State v. Mack, 101 P.3d 349 (Or. 2004) 4, 10

State v. Rivera, 844 A.2d 191 (Conn. 2004) 9

State v. Snowden, 867 A.2d 314, 2005 WL 275752 (Md. 2005) 9

State v. Vaught, 682 N.W.2d 284 (Neb. 2004) 9, 10

FEDERAL STATUTE

28 U.S.C. § 1257 1

OTHER AUTHORITY

Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L. J. 1011 (1998) 9

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia, App., *infra*, 1a, is reported at 607 S.E.2d 526. The district court's final sentencing order, App., *infra*, 10a, is unpublished.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered an order affirming the judgment of conviction on December 3, 2004. App., *infra*, 1a. By order dated February 16, 2005, The Chief Justice extended the time for filing this petition to and including April 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, amend. VI, states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

In *Crawford v. Washington*, 124 S. Ct. 1354, 541 U.S. 36 (2004), this Court held that the Confrontation Clause of the Sixth Amendment bars the introduction of "testimonial" hearsay at a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. The Court stated that the term "testimonial hearsay" covers "at a minimum" prior testimony and statements made during police interrogations. *Id.* at 1374. The Court recognized that it might also cover other "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*

at 1364. However, the Court left "for another day" the resolution of that issue. *Id.* at 1374.

The Supreme Court of Appeals of West Virginia, in conflict with the First, Fifth, Sixth, and Ninth Circuit Courts of Appeals as well as the highest courts of Connecticut, Maryland, Nebraska, and Nevada, has held that "testimonial hearsay" is limited to statements made to government officials. Accordingly, this case presents an excellent opportunity for the Court to decide the issue left open in *Crawford* and to provide "thousands of federal prosecutors and tens of thousands of state prosecutors" with guidance about what kinds of statements are covered by *Crawford*'s new rule. 124 S. Ct. at 1378 (Rehnquist, C.J., concurring). The facts of this case squarely present the question whether statements other than those made to government officials fall within the definition of "testimonial hearsay" announced by *Crawford*.

The State's case against Petitioner was based almost entirely on hearsay. No witnesses identified Petitioner, and the murder weapon was never produced. Instead, one of the deceased victim's friends was permitted to testify that the victim told him that he would know whom to blame "if something ever happens to him." (11/20/2002 Tr. at 267.) Based principally on this and other hearsay, Petitioner was convicted of first degree murder and sentenced to life imprisonment without possibility of parole. On appeal, the Supreme Court of Appeals of West Virginia held that the Confrontation Clause was not implicated because the hearsay statements were not made to government officials and therefore were not "testimonial."

1. *Crawford v. Washington* (2004). In *Crawford*, the Court decided that the Confrontation Clause of the Sixth Amendment prohibits the admission of certain out-of-court statements implicating the defendant in a crime, even if such statements are found to be "reliable." The Court held that the

reliability framework is "unpredictable" and that, at least in circumstances in which the out-of-court statements are "testimonial," the framework "fails to provide meaningful protection from even core confrontation violations." 124 S. Ct. at 1371. Thus, the Court concluded that "testimonial" hearsay may not be admitted unless the hearsay declarant is unavailable and the defendant was given an opportunity for cross-examination. *See id.* at 1374.

The out-of-court statement admitted at the trial in *Crawford* was a tape-recorded police interview of the defendant's wife discussing her husband's crime. *See id.* at 1356-58. The trial court admitted the statement under *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that an out-of-court statement by an unavailable witness is admissible as long as the statement bears "'adequate indicia of reliability.'" 124 S. Ct. at 1358 (quoting *Roberts*, 448 U.S. at 66). The statement to the police was reliable, the trial court in *Crawford* concluded, in part because the wife "was not shifting blame but rather corroborating her husband's story" and the wife "was describing recent events." *Id.* The Washington Supreme Court affirmed.

This Court reversed. After examining the history of the Sixth Amendment, the Court concluded that the Amendment's "primary object" is "testimonial hearsay," of which "[v]arious formulations . . . exist": (1) "ex parte in-court testimony or its functional equivalent," (2) "extrajudicial statements . . . contained in formalized testimonial materials," and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 1365, 1364. When such testimonial statements are at issue, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374.

The Court did not, however, provide a definition of "testimonial hearsay," reasoning that the statement to the police in *Crawford* "is testimonial under any definition," 124 S. Ct. at 1370, and deciding to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" *id.* at 1374. The Court suggested that it might soon articulate a definition to clear up the "interim uncertainty." *Id.* at 1374 n. 10.

Since *Crawford*, the lower courts have struggled with applying its holding, in part because the Court, "having made 'testimonial evidence' a central piece of its Confrontation Clause analysis, declined to define that concept." *State v. Mack*, 101 P.3d 349, 352 (Or. 2004). *See also, e.g., Stancil v. United States*, 866 A.2d 799, 812 (D.C. 2005) (noting the "numerous post-*Crawford* decisions . . . not all of [which] are consistent with one another").

2. This Case. Petitioner Brian Bush Ferguson was convicted of first-degree murder based almost entirely on hearsay statements made by an unavailable declarant who was never cross-examined.

On March 15, 2002, Ferguson was a student at West Virginia University with a near-perfect grade point average when he was arrested for murder, subsequently tried, convicted, and sentenced to life in prison without the possibility of parole. According to the State, Ferguson fatally shot Jerry Wilkins near the campus of West Virginia University. Two witnesses saw the shooting and testified that the assailant was a dark-skinned or black male, approximately six feet to six feet two inches tall, wearing dark clothing. Neither witness was able to identify Ferguson as the assailant. Wilkins remained conscious for a time after the shooting, and he spoke directly with police and medical personnel, but he did not name his assailant. The police did not recover the murder weapon.

Immediately after the shooting, members of Wilkins's fraternity went to the hospital and told the police that, based on prior accusations Wilkins had made against Ferguson, Ferguson was the only person who could be responsible for the shooting. (11/21/2002 Tr. at 198-99.) Lacking a weapon or a witness identifying Ferguson as the assailant, the State relied almost entirely on these hearsay accusations to build its case at trial.

Specifically, the trial court permitted one of Wilkins's fraternity brothers to testify, over defense objections, that months before the killing, he and Wilkins "were having a conversation" about Ferguson, and that Wilkins said he was "worried" and "thought he was going to have to confront [Ferguson] physically." (11/20/2002 Tr. at 266-67.) The witness then delivered this crucial testimony for the State's case: "[W]e were having a conversation [and Wilkins said] that if something ever happens to him, I know who did it and [Wilkins] started talking about different incidents that were transpiring as far as [seeing] the defendant's vehicle [around the area where Wilkins lived]." (11/20/2002 Tr. at 267.)

Ferguson's trial counsel repeatedly objected to this testimony, arguing that "it's rank hearsay," that it "violates Mr. Ferguson's right to confront what now is an absent accuser," and that it is "accusatory toward Mr. Ferguson and Mr. Ferguson cannot respond to [it] since Mr. Wilkins is not here and we can't cross examine [him]." (11/20/2002 Tr. at 264-65.) At the time of trial, this Court had not yet decided *Crawford*, and the trial court overruled Ferguson's objections and stated, "As a matter of fact, it is hearsay absolute [sic] without question, but [Rule] 803 provides a bunch of exceptions that says . . . it's admissible and that is all I am saying." (11/20/2002 Tr. at 265.)

The State in its closing argument described this hearsay as "perhaps . . . the most important testimony in the case because it does tell you, it does tell you that Jerry

Wilkins told us who killed him." The State argued that Wilkins "didn't need to tell who killed him [at the scene of the shooting] because he had told [his fraternity brother] and because people knew of that view and he had predicted that something would happen to him and something bad did happen to him." (11/25/2002 Tr. at 271-72.)

To bolster this hearsay, the State relied on other hearsay to show that Ferguson had a "grudge" against Wilkins and therefore had a motive to kill him. The State produced several of Wilkins's friends and fraternity brothers who testified that Wilkins had told them that Ferguson confronted him about a year and a half before the shooting and warned him to stay away from his girlfriend. According to these witnesses, Wilkins told them that he sometimes rode to school with Ferguson's girlfriend and that one morning she picked him up and that Ferguson was in the car too. These witnesses testified that Wilkins had claimed that on the drive to school Ferguson "turned around [in the front seat] with a knife" and told Wilkins to "leave my girlfriend alone, don't say nothing to her no more." (11/21/2002 Tr. at 52.) The other two persons in the car, Ferguson and the young woman, refuted that testimony.

Over defense counsel's objections, the trial court admitted these hearsay statements under the excited utterance exception, and stated that they were "a key piece of evidence for the State." (11/25/02 Tr. at 201.) Indeed, the State's reliance on this hearsay, along with the paucity of physical evidence, led the trial court to conclude: "Without that [hearsay] evidence [the State] probably – well, I don't want to make a comment. The case is much weaker. How is that for a comment?" (11/25/02 Tr. at 201.)

3. The Opinion of the Supreme Court of Appeals of West Virginia. On appeal to the Supreme Court of Appeals of West Virginia, Ferguson argued, *inter alia*, that this Court's intervening decision in *Crawford v. Washington*

prohibits the admission of the hearsay statements that were introduced at trial because Ferguson never had an opportunity to cross-examine the source of these statements. Ferguson's counsel explained that the *Crawford* Court "repudiated the general framework set forth in *Ohio v. Roberts* . . . [and held] that a judicial determination of 'reliability' regarding a 'testimonial' hearsay statement is too ill defined to satisfy Sixth Amendment protections." (Br. at 8-9.) Thus, the trial court's admission of the statements under exceptions to the hearsay rule "is constitutionally impermissible." (Br. at 9.)

The Supreme Court of Appeals of West Virginia refused to apply the rule of *Crawford*, however, because the statements were made to "non-official and non-investigatorial witnesses" and were "made prior to and apart from any governmental investigation." App., *infra*, 4a. The court therefore concluded, "we do not perceive that *Crawford*'s largely unexplored ban on 'testimonial hearsay' that has not been tested by cross-examination extends to [these] statements." App., *infra*, 4a. The court did not consider whether the statements were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." *Crawford*, 124 S. Ct. at 1364.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Supreme Court Of Appeals Of West Virginia Conflicts With Decisions Of Four Federal Courts Of Appeals, As Well As The Highest Courts Of At Least Four States.

The Supreme Court of Appeals of West Virginia held that an out-of-court statement is "testimonial hearsay" only if it is made to an "official" or "investigatorial witness" as part of a governmental investigation. App., *infra*, 4a. However, both the Fifth and Sixth Circuits have held that such statements may be testimonial in other circumstances as well. In *Guidry v. Dretke*, the Fifth Circuit held that statements made by a co-conspirator to his girlfriend – who was neither an official nor an investigatory witness – were barred by *Crawford*: "Admission of hearsay statements of the type at issue violates [the Confrontation] [C]lause unless the witness is unavailable and the defendant had prior opportunity to cross examine him." 397 F.3d 306, 329 (5th Cir. 2005). Moreover, the Sixth Circuit in *United States v. Cromer* explicitly rejected the proposition that testimonial hearsay is limited to statements "made directly to authorities." 389 F.3d 662, 672-75 (6th Cir. 2004).

In *Cromer*, the Sixth Circuit embraced a "broader" definition of testimonial hearsay proposed by Professor Richard Friedman, based in part on the court's desire "to ensure that the adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation." *Id.* at 674. The Sixth Circuit therefore held that the "proper inquiry" is "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime." *Id.* at 675. *See also id.* at 673 ("'A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, *whether made to the authorities or not.*'") (quoting Richard D. Friedman,

Confrontation: The Search for Basic Principles, 86 GEO. L.J. 1011, 1042-43 (1998)) (emphasis added).[1] In this case, Wilkins's statement to his fraternity brother that if anything happens to him, his friend would know that Ferguson did it, can only be understood as reflecting Wilkins's expectation that the statement would be used against Ferguson in a criminal trial.

The West Virginia court's definition of "testimonial" also conflicts with the definitions articulated by other courts. The First and Ninth Circuits, along with the highest courts of Connecticut, Maryland, Nebraska, and Nevada, do not look only to the status of the person to whom the statement was made, but rather ask whether "an objective person would reasonably believe that the statement would be available for use at a later trial." *Horton v. Allen*, 370 F.3d 75, 84 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 971 (2005); *Parle v. Runnels*, 387 F.3d 1030, 1037 (9th Cir. 2004); *State v. Rivera*, 844 A.2d 191, 364-65 (Conn. 2004); *State v. Snowden*, 867 A.2d 314, 2005 WL 275752, *7 (Md. 2005); *State v. Vaught*, 682 N.W.2d 284, 325-26 (Neb. 2004); *City of Las Vegas v. Walsh*, 91 P.3d 591, 594-96 (Nev. 2004).

II. The Conflict Is Mature And Requires Immediate Resolution By This Court.

The Supreme Court of Appeals of West Virginia is not alone in limiting "testimonial hearsay" to statements

---

[1] The Sixth Circuit was concerned that relying solely on the identity of the person to whom the statement was made or on the formality of the circumstances surrounding the statement could create perverse incentives for witnesses and prosecutors: "If the judicial system only requires cross-examination when someone has formally served as a witness against a defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally." *Cromer*, 389 F.3d at 675.

made to government officials. The Eighth Circuit, along with the highest courts of other States, including Maine and New Mexico, likewise restrict the meaning of testimonial to statements made to the government. *See, e.g., Evans v. Luebbers*, 371 F.3d 438, 445 (8th Cir. 2004) (*Crawford* applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations"), *cert. denied*, 125 S. Ct. 902 (2005); *State v. Barnes*, 854 A.2d 208, 211-12 (Me. 2004) (considering whether statement was made in response to "structured" police questioning); *State v. Dedman*, 102 P.3d 628, 636 (N.M. 2004) (*Crawford*'s "core concern is government officers who are prosecuting or investigating a crime, or interrogating or at least questioning a witness"). The conflict has produced inconsistent holdings regarding whether nearly identical out-of-court statements are barred by the Confrontation Clause. *Compare State v. Vaught*, 682 N.W.2d 284, 325-26 (Neb. 2004) (child victim's statements to physician are not testimonial), *with State v. Mack*, 101 P.3d 349, 593 (Or. 2004) (child victim's statements to health care worker are testimonial).

In the year since *Crawford* was decided, lower courts have been inundated with *Crawford* claims and are grappling with whether particular types of hearsay evidence are "testimonial" and therefore barred by the Sixth Amendment. As The Chief Justice predicted, "the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists . . . is covered by the new rule [and] [t]hey need them now, not months or years from now." *Crawford*, 124 S. Ct. at 1378 (Rehnquist, C.J., concurring).

Since *Crawford*, six courts of appeals and at least twelve state courts of last resort have sought to articulate a definition of "testimonial," but there remains great uncertainty. *See, e.g., United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004) (stating that *Crawford* "left open the

possibility that the definition encompasses a broader range of statements," but that it is "unclear" what characteristics "are determinative of whether a given statement constitutes testimony"), *cert. denied*, 125 S. Ct. 938 (2005); *Stancil v. United States*, 866 A.2d 799, 812 (D.C. 2005) (noting the "numerous post-*Crawford* decisions . . . not all of [which] are consistent with one another"). Given the importance of the issue, and the need for clarity and consistency in this area of the law, the issue should be resolved sooner rather than later. *See Crawford*, 124 S. Ct. at 1374, 1378 (Rehnquist, C.J., concurring) (stating that *Crawford* "casts a mantle of uncertainty over future criminal trials in both federal and state courts").

III. Deciding The Question Presented Is Necessary To Complete This Court's New Framework For Analyzing Confrontation Clause Violations.

Crawford represented a significant departure from the Court's prior Confrontation Clause analysis. The *Crawford* Court explained that the old rule had "condition[ed] admissibility of all hearsay evidence on whether it [fell] under a 'firmly rooted hearsay exception' or [bore] 'particularized guarantees of trustworthiness,'" 124 S. Ct. at 1369 (quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)), but the Court held that the old rule was "unpredictable" and "amorphous," *id.* at 1371. Over time, "[m]embers of this Court and academics [had] suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause." *Id.* at 1369-70 (citing concurring opinions by Justices Breyer, Thomas, and Scalia). In *Crawford*, a majority of the Court agreed and held that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 1370.

As the Court explained, the Sixth Amendment incorporates "the common law in 1791 [which] conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." *Id.* at 1365-66. The requirement of cross-examination "reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined." *Id.* at 1370. Thus, the requirement of cross-examination is "dispositive, and not merely one of several ways to establish reliability." *Id.* at 1367.

Crawford's new rule requiring cross-examination before admitting testimonial hearsay will not be fully realized until the Court addresses the question presented and provides a comprehensive definition of the term "testimonial."

IV. This Case Provides An Ideal Vehicle For Resolving This Important Question.

This case offers the Court the opportunity to resolve the disagreement among the courts of appeals and state courts. *First*, the hearsay statements admitted against Ferguson satisfy the "objective witness" definition of "testimonial" suggested in *Crawford* and subsequently adopted by some lower courts. For example, the statement by Wilkins to his friend that Ferguson should be held responsible "if something ever happens" to him was made for the very purpose of ensuring that the statement would be "use[d] at a later trial." Indeed, the State argued in closing that Wilkins intended his statement to his friend to be a substitute for a statement made by him to the police: "[Wilkins] didn't need to tell who killed him [at the scene of the shooting] because he had told [his fraternity brother] and because people knew of that view and he had predicted that something would happen to him and something bad did happen to him."

Second, but for the hearsay statements, Ferguson would not have been convicted. The statements linked

Ferguson to Wilkins, and they formed the basis for the State's theory of motive. In its closing, the State argued to the jury that "perhaps . . . the most important testimony in the case" is Wilkins's statement to his friend blaming Ferguson for anything that might happen to him because, the State argued, "it does tell you that [Wilkins] told us who killed him."

This case thus provides the Court an ideal opportunity to define the scope of the "objective witness" definition of testimonial hearsay, resolve the conflict plaguing the lower courts, and promote uniformity in the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric H. Holder, Jr.
Counsel of Record
Robert A. Long
Elaine W. Stone
Sarah L. Wilson
James M. Garland
Jenny C. Ellickson
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff Below, Appellee

v.

BRIAN BUSH FERGUSON, Defendant Below, Appellant.

No. 31720

(Appeal from the Circuit Court of Monongalia County
Hon. Robert B. Stone, Judge
Case No. 02-F-95)

[Submitted Nov. 9, 2004.
Decided Dec. 3, 2004.]

SYLLABUS BY THE COURT

1. "In order to qualify as an excited utterance under W.Va.R.Evid. 803(2):(1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition." Syllabus Point 7, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995).

2. "Within a W.Va.R.Evid. 803(2) analysis, to assist in answering whether a statement was made while under the stress or excitement of the event and not from reflection and fabrication, several factors must be considered, including: (1) the lapse of time between the event and the declaration;

(2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements." Syllabus Point 8, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995).

3. " Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syllabus Point 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

4. "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, *State v. Guthrie*, 194, W.Va. 657, 461 S.E.2d 163 (1995).

PER CURIAM:

In the instant case, we affirm a first degree murder conviction.

I.

The appellant, Brian Bush Ferguson, was convicted of first degree murder in November of 2002. The jury did not recommend mercy and on February 24, 2003, the appellant was sentenced to life imprisonment without the possibility of parole. We discuss the relevant facts of the case and the applicable standards of review *infra* as part of our consideration of the issues raised on appeal.

II.

A.

The appellant argues that the trial court erred by admitting hearsay evidence about an altercation between the appellant and the victim prior to the incident in which the victim died.

This evidence came from friends of the victim, who testified at trial that the victim had told the friends that the appellant had threatened the victim with a knife during a heated conversation about the appellant's girlfriend. The trial court admitted the testimony about the victim's statements under the "excited utterance" exception to the hearsay rule, *W.Va. Rules of Evidence* 803(2).

State v. Sutphin, 195 W.Va. 551, 466 S.E.2d 402 (1995), Syllabus Points 7 and 8, states:

> 7. In order to qualify as an excited utterance under *W.Va.R.Evid.* 803(2): (1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication;

and (3) the statement must relate to the startling event or condition.

8. Within a *W.Va.R.Evid.* 803(2) analysis, to assist in answering whether a statement was made while under the stress or excitement of the event and not from reflection and fabrication, several factors must be considered, including: (1) the lapse of time between the event and the declaration; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements.

We have carefully reviewed the statements in question, which all of the evidence indicated were made by a person in an emotionally upset condition, just minutes after a frightening event. There was no evidence suggesting fabrication by the declarant. We agree with the trial court's conclusion that they were "excited utterances" and were admissible as such.

The appellant also argues that even if the victim's statements were "excited utterances," they were inadmissible as "testimonial hearsay," barred by the Confrontation Clause (*U.S. Constitution*, Amendment 6), as announced in the very recent case of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). However, we do not perceive that *Crawford's* largely unexplored ban on "testimonial hearsay" that has not been tested by cross-examination extends to the statements to non-official and non-investigatorial witnesses, made prior to and apart from any governmental investigation, that are issues in this case.

We therefore find no error in the circuit court's ruling on the admissibility of the hearsay statements about the knife incident.[1]

B.

The appellant's next assignment of error asserts that the trial court erred in allowing the prosecution to place before the jury testimony and argument that amounted to commenting on the appellant's exercise of his constitutional rights to remain silent and to have the advice of counsel.

This testimony and argument related to the fact that the appellant, prior to his arrest, ended a police questioning session by asserting his right to consult with an attorney. A police officer testified at trial that the appellant said that he was going to get in touch with an attorney and then make arrangements to come back and talk with the police, but that the appellant did not do so.

Presenting evidence, comment, or argument that in response to official questioning or accusation a defendant has exercised his or her right to be silent or to have an attorney is fraught with the undeniable and serious danger that the jury will make the powerful inference that "an innocent person would not do such a thing." Therefore, to give teeth to these crucial constitutional protections, our jurisprudence mandates that such evidence, comment, or argument should be scrupulously avoided:

---

[1] The appellant also references other testimony relating to statements by the victim about the appellant, arguing that this testimony should not have been admitted. We have reviewed this testimony and find that the court did not err in concluding that it met the criteria of applicable hearsay exceptions and did not offend *Crawford*.

> Under the Due Process Clause of the *West Virginia Constitution*, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.

Syllabus Point 1, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977)

However, if a defendant himself or herself clearly "opens the door" by presenting evidence or argument about such conduct by the defendant, the trial court may allow the prosecution to inquire or otherwise touch on this subject-- if it is necessary in fairness to present the prosecution's perspective, keeping in mind the need to keep the jury as much as possible from improperly drawing inferences from the accused's exercise of his rights. *See, e.g., State v. Mills*, 211 W.Va. 532, 544, 566 S.E.2d 891, 903 (2002). This, we perceive, is what happened in the instant case.

Specifically, the appellant introduced into evidence at trial a video tape of the police interview in which the appellant broke off police questioning and asserted his right to counsel; and the appellant's counsel questioned the police officer at trial about the events shown on the tape. The decision by the appellant and his counsel to play the police interview tape for the jury was a reasonable weighing of the benefit to the appellant versus the possible inference the jury could take from the appellant's cutting the interview short in accordance with his right to do so. Under these circumstances, it was not unfair for the trial court to allow the prosecution to also address, in a limited fashion, the events shown on the tape.

Moreover, after reviewing the more than 1,000 pages of transcript of the appellant's trial, we find that any evidence or comment referencing the appellant's assertion of his rights was marginal and beyond a reasonable doubt could not have had importance in the jury's decision. We therefore find no merit in this assignment of error.

C.

The appellant's third assignment of error is that the trial court "warned" the appellant that cross-examination of a witness for the prosecution about his involvement in certain unrelated offenses might "open the door" for that witness testifying to the appellant's involvement in those offenses.

The record reflects that this issue arose in connection with the court's ruling on a prosecution motion *in limine*; and that the trial court's warning was cautionary in nature, directing both the prosecution and defense to be careful where their questions led to avoid bringing in prejudicial extraneous matters, and to come to the bench before going into uncertain areas. A complete review of this witness' testimony does not reveal any rulings by the trial court that constituted reversible error.

D.

The appellant also asserts error in the court's instructions. We conclude that even granting the remotest inferences to the appellant, the trial court had no evidentiary basis upon which to instruct the jury on voluntary manslaughter. The court's instructions did not deviate from the standard of beyond a reasonable doubt for all elements of the offense, nor did the court err in instructing on the mercy issue. We find no instructional error.

E.

Finally, the appellant asserts that there was insufficient evidence for a conviction of first-degree murder.

There was evidence from which the jury could conclude that the appellant had harbored animosity toward the victim over a lengthy period of time and had made a threat of physical harm toward the victim at knife-point; that a subsequent encounter between the appellant and the victim further fueled the appellant's desire for retaliation against the victim, which the appellant expressed before the murder by stating that he would get the victim alone; and that the appellant had been "stalking" the victim by parking in the victim's parking lot just outside the victim's apartment in the weeks and days before the murder.

The jury also could find that appellant, whose physical appearance fit the descriptions of the shooter given by several witnesses, was known to be in the near vicinity of the shooting within minutes of the shooting; that the police subsequently obtained from the appellant's possession articles of clothing that were consistent with the description given by eyewitnesses to the shooting; that gunshot residue was found on those garments; that the appellant gave inconsistent and false statements to police in the early hours of the murder investigation; that the appellant's friend reported that approximately two weeks before the murder he had observed a large, stainless steel revolver in the appellant's apartment; that this gun fit the description of the firearm observed by an eyewitness to the shooting; and that the victim was killed by a .44 caliber magnum bullet of the type shot from this gun.

The standard set forth in Syllabus Point 1 of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995) is:

> The function of an appellate court when reviewing the sufficiency of the evidence to

> support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Applying this standard, the evidence for conviction was sufficient.

III.

This Court has carefully reviewed the entire record in the instant case. The appellant's trial counsel presented a strong challenge to every evidentiary aspect of the prosecution's case. The trial court made a number of evidentiary rulings that were favorable to the defense. The prosecution's witnesses were tested in extended and effective cross-examination. The appellant took the stand, and presented his version of events to the jury.

Upon our review of the record, we conclude that the appellant received a fair trial, and we therefore affirm the circuit court's order entering judgment of conviction.

Affirmed.

IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA
DIVISION NO. 1

STATE OF WEST VIRGINIA

VS. FELONY NO. 02-F-95

BRIAN BUSH FERGUSON
Defendant.

ORDER CORRECTING EFFECTIVE SENTENCE DATE

[Entered March 11, 2003]

On February 24, 2003, the State appeared by Prosecuting Attorney Marcia L. Ashdown and Assistant Prosecuting Attorney Perri DeChristopher, and the defendant appeared in person and with his attorney, James B. Zimarowski, for a post-trial motions/sentencing hearing in this case, with the Honorable Robert B. Stone presiding.

The Court noted that the defendant had file a motion for a new trial, citing various grounds in support of the motion, and a motion for judgment of acquittal, citing insufficiency of the evidence. The State filed responses to both motions.

Counsel for the defendant advised that the majority of the grounds set forth in the motion for a new trial had been addressed and ruled upon by the court in pre-trial motions and during the trial, and that the defendant would rely upon the written motion for those issues. However, counsel addressed item number 2, asserting that the State had commented on the defendant's Sixth Amendment right to remain silent during certain trial testimony and in closing arguments, and that the Court had incorrectly denied a

defense motion for a mistrial during trial and the Court sustaining the defendant's objection during closing arguments was insufficient to remove the taint. The State argued that the State had not commented at any time on the defendant's constitutionally protected silence, that the defendant was incorrect in his recollection of the sequence of trial testimony, that the defendant had invited the clarification testimony offered by the State during redirect examination of the witness, that the State was not in any way commenting during closing arguments upon the defendant's silence.

In ruling upon the motion for a new trial, the Court agreed that the majority of grounds raised had been thoroughly discussed prior to and during the trial, and had resulted in rulings that the Court has no reason to alter post trial. Additionally, the Court stated that the Court did not agree with the defendant's representations as to the sequence of testimony leading to his motion for mistrial and advised that the Court's recollection was similar to the State's. The Court ruled that the State's evidence on the point raised by the defendant was permissible clarification of questions raised by the defendant and not impermissible comment. The Court further ruled that the Court sustaining the defendant's objection during closing was sufficient. Accordingly, the Court DENIED the defendant's motions for a new trial and judgment of acquittal and proceeded to the sentencing stage of the proceedings.

The Court inquired as to whether the defendant had received the pre-sentence report. The defendant stated that he had received and reviewed the report, and advised the Court that he had no corrections or comments regarding the report.

The defendant offered no argument or allocution before sentencing. The victim's mother spoke about the

impact the murder of her son had left upon herself and many others.

In accordance with the jury's verdict finding the defendant guilty of murder in the first degree with no recommendation for mercy, **the Court sentenced the defendant to serve a term of life imprisonment in the West Virginia State Penitentiary, with the possibility of parole.**

CONVICTION DATE: November 26, 2002

SENTENCE DATE: February 24, 2003

EFFECTIVE SENTENCE DATE: November 26, 2002

The Court then advised the defendant of his right to appeal, including the requirement of giving notice of intent to appeal, which must be filed within thirty days of entry of the sentencing order. The Court further advised the defendant that thereafter the appeal must be filed within four months of the sentencing order and the defendant must request whatever portion of the record is desired. The Court also informed the defendant of his right to counsel for the appeal, which he may obtain by filing an affidavit in support of his request for appointed counsel. The Court advised that the defendant's present counsel would be appointed for the appeal upon the defendant's filing of a financial affidavit.

The Court ORDERED that the defendant be immediately taken into custody to be held at the North Central Regional Jail until he is transported to the custody of the commission of corrections.

It is ORDERED that the Clerk of Court shall provide a copy of this Order to James B. Zimarowski, counsel for the defendant; to Robert Arnold, Division of Corrections, Parole Services, 215 West Main Street, Clarksburg, WV 26301; to the West Virginia Division of Corrections, attn: Diann

Skiles, 112 California Ave., Bldg. 4, Room 300, Charleston, WV 25304; and to the Office of the Prosecuting Attorney.

/s/

Judge

Entered March 11, 2003
Law Order Book 128 Page 239
Jean Friend, Clerk